

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 9, 2003 at 8 A.M., in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 26, 1/9/2003; HB29,
1/9/2003; HB 48, 1/9/2003; HB
15, 1/9/2003; HB 17, 1/9/2003
Executive Action: HB 81

HEARING ON HB 26

Sponsor: REP. JUNEAU, HD 85, Glacier

Opening Statement by Sponsor:

REP. JUNEAU opened on HB 26 on behalf of State Tribal Affairs Interim Committee stating this bill revises the criteria for the Board of Pardons and Parole (the Board). The intent of this bill is to require that the Board include at least one qualified American Indian member. She stated if an American Indian is not available, then the Board must appoint a person who possesses particular knowledge of American Indian culture and problems. REP. JUNEAU submitted a copy of a Montana Supreme Court case, Donny Ray George v. Montana Board of Pardons, in support of HB 26. This Bill will ensure that the American Indian representation continues on the Board.

EXHIBIT(juh04a01)

EXHIBIT(juh04a02)

{Tape: 1; Side: A; Approx. Time Counter: 15 - 80}

Proponents' Testimony:

NORMA BIXBY, HD 5, Lame Deer, supported HB 26, stating that this bill would ensure that a Native American would be on the Board or at least possess particular knowledge of American Indian culture and problems. She stated this legislation would assure at least one Board member who understands where Native Americans are coming from. She stated there have been times when the Native American culture has not been represented on the Board.

Susan Guerin, Cherish Our Indian Children, supported HB 26, stating that the tribal governments of Montana support this bill.

EVE MARLO supported HB 26, stating that there is a lack of understanding by the dominant culture about the tribal culture, and that the number of Native Americans in the Montana State Prison (MSP) far outweighs their proportion in the general population. **Ms. Marlo** stated that one small step in righting this imbalance would be to have someone who understands Native cultures on the Board.

Betty Whiting, Montana Association of Churches, supported HB 26, stating that there are systemic injustices against the Native population and that HB 26 will end one institutional injustice. She stated human rights extend to prisoners, that no offender

should be subjected to more custody than is necessary and that this bill could result in a financial benefit to the State.

Cris Christiaens, Great Falls, appeared on behalf of licensed social workers in support of HB 26.

REP. JONATHAN WINDY BOY, HD 92, Tribal Council member for Chippewa Cree Tribe, supported HB 26 stating the statistics **REP. JUNEAU** presented are fact. **REP. WINDY BOY** stated this bill is a move forward.

{Tape: 1; Side: A; Approx. Time Counter: 237 - 266}

Opponents' Testimony: None

Informational Testimony:

Colleen White, Attorney, Department of Corrections, spoke as an informational witness on HB 26. **Ms. White** spoke about HB 211 and that if it passes, it could change the George decision by the Montana Supreme Court. **Ms. White** stated that ensuring one Board member be present at all of the Hearings involving a Native American could present an issue. She suggested a possible solution would be to conduct parole hearings by video conferencing or else appoint someone who could ensure they would be able to be at every Hearing.

{Tape: 1; Side: A; Approx. Time Counter: 271 - 316}

Craig Thomas, Executive Director, Montana Parole Board, testified as an informational witness. He stated that Board members are citizen members with other jobs; they have to prepare for every hearing and every case. The Native American Board member would also have to prepare for other cases. This would be extremely burdensome and present some practical issues. He stated with some amendments, that this bill could work. He stated since 1979, the Board has provided for an American Indian on the Board.

Questions from Committee Members and Responses:

REP. GALLUS opined that **Ms. White** and **Mr. Thomas** testified about serious practical issues of the bill. **REP. GALLUS** stated that they did not meet the definition of pure information due to some of their negative opinions.

{Tape: 1; Side: A; Approx. Time Counter: 358 - 367}

REP. NEWMAN stated the two witnesses were informational and it is extremely important that the witnesses advised the Committee that

HB 211 is before the Senate with issues relating to HB 26. He stated that HB 211 would change the structure of the Board, if passed, requiring all Board members to have training. **REP.**

LASZLOFFY stated he concurred with **REP. NEWMAN**.

{Tape: 1; Side: A; Approx. Time Counter: 368 - 387}

CHAIRMAN SHOCKLEY declared Mr. Thomas as an informational witness and Ms. White as an opponent.

REP. HARRIS expressed Constitutional concerns with statutory language that mandates a person's ethnic background or race. He posed a hypothetical scenario of a bill stating that five members of the Board must be white males, backed with statistics showing the large white male population. **REP. JUNEAU** responded there is a clause in the Constitution which recognizes the cultural heritage of American Indians. She stated that current law requires all Boards and Commissions in Montana have equitable distribution of racial and gender balance.

{Tape: 1; Side: A; Approx. Time Counter: 423 - 550}

REP. HARRIS asked **Mr. Christiaens** whether he considered Article I, Section IV of the Montana Constitution. **Mr. Christiaens** stated that he did not but they had legal staff present when this issue was discussed at length and that the current law requires one Board member to have knowledge of Native American culture.

{Tape: 1; Side: A; Approx. Time Counter: 470 - 505}

REP. FACEY asked **REP. JUNEAU** why Native American women are being incarcerated at such a high rate. **REP. JUNEAU** stated her opinion is that Native women are more passive and often go along without protest.

Closing by Sponsor:

REP. JUNEAU closed on HB 26 stating that it would be a good idea to work on amendments with an eye on HB 211 to ensure a Board that really represents Montana.

{Tape: 1; Side: B; Approx. Time Counter: 14 - 34}

HEARING ON HB 29

Sponsor: ALAN OLSON, HD 8, Musselshell Valley

Opening Statement by Sponsor:

REP. OLSON opened on HB 29 stating that it clarifies that participation in boot camp may reduce the period of incarceration but not the incarceration term of a sentence. He stated that "incarceration term" needs to be defined.

{Tape: 1; Side: B; Approx. Time Counter: 38 - 60}

Proponents' Testimony:

Dan Schwartz, Chief Deputy County Attorney, Billings, quoted from a movie, "Cool Hand Luke," stating, "what we have here is a failure of communication." **Attorney Schwartz** stated this bill aims at clarifying the language. He stated that he is a great believer in the boot camp program and that DOC is doing a great job. He stated that in offenses against the person, it is important that prosecutors be involved and have a say in whether or not an offender may qualify for boot camp. He stating the public would have greater support for the boot camp program knowing the prosecution is doing further screening to ensure that someone who is incapable of rehabilitation is not slipping through the cracks.

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. PARKER asked **Deputy Schwartz** about the prosecution's role in sentencing. **Deputy Schwartz** stated that there are two situations where the prosecution has a role with regards to sentencing. One is when you have a 1(b) type plea agreement, where a judge is bound by the prosecution's recommendation or the defendant may withdraw his guilty plea and the whole process starts over. The other is where a prosecutor agrees to preserve an appellate issue if an individual enters a guilty plea.

{Tape: 1; Side: B; Approx. Time Counter: 146 - 156}

CHAIRMAN SHOCKLEY added a prosecutor also has a veto in a plea of Nolo Contendre.

REP. NOENNIG asked **Deputy Schwartz** why it is necessary for the prosecution to have a veto power. **Deputy Schwartz** responded that although it may only be a small percentage of cases, it is very important for the prosecution to be able to have input on whether an individual be allowed to attend boot camp.

{Tape: 1; Side: B; Approx. Time Counter: 168 - 242}

REP. CLARK asked Deputy Schwartz about reductions of a person's sentence who attends boot camp. **Deputy Schwartz** stated that this happens frequently if the judge chooses to suspend part or all of the term of incarceration. **REP. CLARK** asked whether victims are involved in the post boot camp process. **Deputy Schwartz** stated that the victims do have input and an opportunity to speak to the Court. **REP. CLARK** asked about the average reduction in a sentence. **Deputy Schwartz** stated that the typical reduction is a five year sentence with five suspended.

{Tape: 1; Side: B; Approx. Time Counter: 243 - 318}

REP. RICE asked Deputy Schwartz about recidivism statistics. **Deputy Schwartz** stated that they do not all come back, and that the boot camp program does work. He stated that Mr. Burton could answer more at length about the recidivism. **REP. RICE** asked Dan Burden the same question about recidivism. **Mr. Burden** stated that new crimes recidivism are lower than crimes of persons released from prison and that the screening committee looks at the judges recommendations carry a lot of weight.

REP. GALLUS asked Deputy Schwartz about the recidivism rates. Mr. Schwartz could not answer.

CHAIRMAN SHOCKLEY expressed his concern to Deputy Schwartz about bills every session to address particular problems and that in the boot camp situation the bill has a veto. **CHAIRMAN SHOCKLEY** stated there is precedent for this, such as the veto in the Nolo bill giving county attorneys a veto. This veto assists the prosecution in moving forward with their case since the Nolo plea could not be used against them on a civil case. **CHAIRMAN SHOCKLEY** stated his concern that judges are hard to sentence, and prosecutors are hard to prosecute.

REP. NOENNIG asked Deputy Schwartz whether making a procedure where the prosecutor's recommendation could be a necessary element in the review by the screening committee would help solve communication problems. **Deputy Schwartz** stated that would be an excellent idea and he would not object if that is what the Committee wants to do.

{Tape: 2; Side: A; Approx. Time Counter: 1 - 16}

REP. PARKER asked **REP. OLSON** about a friendly amendment on the language of "incarceration term" being replaced with "length".

REP. OLSON and **CHAIRMAN SHOCKLEY** suggested John McMaster work on the language of the bill.

CHAIRMAN SHOCKLEY asked Deputy Schwartz whether the prosecution would be satisfied if it had the right to provide the screening committee a document or appear in person before they made their decision. **Deputy Schwartz** agreed that would be fine as long as the statutes or administrative rules allowed the prosecution's recommendation to be taken into account.

{Tape: 2; Side: A; Approx. Time Counter: 17 - 55}

Closing by Sponsor:

REP. OLSON closed on HB 29 stating amendments to ensure county attorneys get a say in the process is a good idea, that the DOC is doing an excellent job and boot camp is a valuable program.

HEARING ON HB 48

Sponsor: **REP. NEWMAN, HD 38, Butte**

Opening Statement by Sponsor:

REP. NEWMAN opened on HB 48 stating this bill revises an assigned counsel's duties who determines that an appeal in a criminal case would be frivolous or without merit. He stated these are called Anders briefs. The bill would give appellate counsel guidance and define counsel's role and duty to a client whose case lacks merit.

Proponents' Testimony:

John Connor, Assistant Attorney General, Chief Criminal Counsel, supported HB 48 stating that the Attorney General's office requested this bill to address the situation where there is an appeal, which is a defendant's absolute right when convicted, but no issues of merit. Mr. Connor stated Anders was a US. Supreme Court case which struck down a California case, allowing counsel to file a letter stating the appeal was meritless. In Anders, the Court stated counsel needed to present an explanation addressing any legal issues which might possibly support the appeal. Mr. Connor stated 46-8-103(2) is Montana's procedure based on the Ander's case. He stated that the bill aims at fixing a problem with consistency in Montana.

{Tape: 2; Side: A; Approx. Time Counter: 114 - 206}

Chad Wright, Appellate Defender Office, stated that he does not have an overall problem with HB 48. However, he objects to the new language requiring appellate counsel, in their motion to withdraw, to discuss issues that may arguably support an appeal and which lack merit. **Mr. Wright** stated in 2002, his office filed thirty-three (33) appeals, six (6) of which were Anders or "no merits" briefs. He stated that the Anders process is very difficult as appellate counsel must review the entire process and then state there are no issues. The provision would require appellate counsel to state the issues the client wants to raise and appellate counsel's reasons why the issues lack merit. He stated that this new language would put appellate counsel at odds with the client.

{Tape: 2; Side: A; Approx. Time Counter: 206 - 293}

Opponents' Testimony: None

Questions from Committee Members and Responses:

REP HARRIS asked Mr. Connor about appellate counsel filing a motion to withdraw as opposed to the procedure proposed in HB 48. **Mr. Connor** responded that HB 48 would require appellate counsel to state there is an appeal, the appeal lacks merit, and then discuss why it lacks merit.

{Tape: 2; Side: A; Approx. Time Counter: 297 - 328}

REP. NOENNIG asked Mr. Connor about the McCoy case and whether appellate counsel must argue the reasons the case lacks merit. **Mr. Connor** replied that it is not enough for appellate counsel to declare the case lacks merit; they must let the court know why it lacks merit and why the issues are frivolous. **REP. NOENNIG** asked about a situation in which the Court refuses to allow counsel to withdraw. **Mr. Connor** stated that if counsel moves to withdraw, states the case lacks merit and why, and the Court denies the motion to withdraw, then counsel must move forward in representing the client.

{Tape: 2; Side: A; Approx. Time Counter: 329 - 407}

REP. FACEY asked Mr. Connor whether the prosecution could have some responsibility to state why the appeal is frivolous in order to protect the appellate counsel. **Mr. Connor** stated that would get to arguing on the merits which would greatly burden the prosecution. **Mr. Connor** stated that he would like to work out some language with the appellate defenders office.

REP. LANGE asked **REP. NEWMAN** about the language of "an appeal" and whether that would bundle all appeals together. He also expressed concern about the ambiguity of the language used in the bill. **REP. NEWMAN** replied it would not have that effect, and regarding the language, Mr. McMaster could work out the language.

{Tape: 2; Side: B; Approx. Time Counter: 1 - 20}

CHAIRMAN SHOCKLEY asked Mr. Wright to explain why he believes it would be improper to tell the Court the client's case lacks merit. **Mr. Wright** stated he explains the Anders process to the client but that the appellate counsel should not be required to explain and discuss why as it puts counsel at odds with the client. **CHAIRMAN SHOCKLEY** suggested listing the cases and Mr. Wright replied that might be work.

Closing by Sponsor:

REP. NEWMAN closed on HB 48, stating that it is important to recognize that the Anders procedure already exists. This bill is to ensure the process is clearly laid out in statute and that there is consistency in the procedure in Montana. **REP. NEWMAN** stated that the Anders situation is different from a regular appeal and that appellate counsel has a duty to his client and to the Court. He stated that the language in HB 48 preserves the defendant's rights.

{Tape: 2; Side: B; Approx. Time Counter: 99 - 180}

JOINT HEARING ON HBs 15 & 17

Sponsor: **REP. NEWMAN**, HD 38, Butte

Opening Statement by Sponsor:

REP. NEWMAN opened on HB 15 stating that the intent of the bill is to change the definition of injury to be consistent with the definition of injury which is in the code for all other criminal offenses in Montana. He stated HB 15 substitutes the term "bodily injury" as used in the criminal code for the terms "physical injury" and "mental injury" in the Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act.

REP. NEWMAN opened on HB 17 stating the intent of this bill was to make it consistent with current Montana law. He stated HB 17 makes the act of exploiting the elderly or developmentally disabled person a felony if the amount involved is over one thousand dollars.

REP. NEWMAN stated that HB 15 and HB 17 are straight forward. He stated that these two bills make important policy statements aimed at protecting people who may not be able to protect themselves.

{Tape: 2; Side: B; Approx. Time Counter: 181 - 330}

Proponents' Testimony:

John Connor, Assistant Attorney General, supported HB 15 and HB 17.

EXHIBIT(juh04a03)

EXHIBIT(juh04a04)

Wally Melcher, Montana Association of Independent Disability Systems Advocacy, supported HB 15 and HB 17, stating that they work with about 4000 disabled individuals and advocate on behalf of those with mental and physical disabilities. Mr. Melcher stated that in prosecutions, the bills will assist with clarification and assuring that disabled people will not be exploited.

Leo Gallagher, Lewis and Clark County Attorney, supported HB 15 and HB 17, stating that they do not go far enough. He stated the bills should also extend to making sexual abuse of the elderly a felony, as it is presently only a misdemeanor.

Rick Bartos, Adult Protective Services, DPHHS, supported HB 15 and HB 17 stating that they would bring consistency with regard to the elder abuse statutes.

{Tape: 2; Side: B; Approx. Time Counter: 475 - 510}

Verner Bertelsen, Senior Citizen, Helena, supported both bills as good for Seniors.

Harry Smith, AARP, supported HB 15 and HB 17 expressing his concern for Montana consumers. He cited numerous statistics regarding fraud surveys. He stated that HB 15 is important, and will help with the investigation and prosecution of elder abuse; HB 17 will greatly enhance the penalties for elder abuse.

{Tape: 3; Side: A; Approx. Time Counter: 1 - 54}

Anita Roessman, Attorney, Montana Advocacy Program, supported HB 15 and HB 17, stating that the language in both bills is good as far as they go. She stated that both bills should be more encompassing and that she agrees with Leo Gallagher's comments

regarding the prosecution of persons who commit sexual crimes against the disabled. **Ms. Roessman** stated that those convicted of crimes against the disabled should receive not only an increase in punishment, but that there should be an enhancement of their sentence. She stated that the most vulnerable people in the community should receive the greatest protections. Ms. Roessman had no objections to the language in HB 17.

{Tape: 3; Side: A; Approx. Time Counter: 55 - 110}

Bob Pyfer, Sr. V.P., Montana Credit Union Network, supported HB 17 stating that this bill would help in the prevention of elder abuse. He recommended increasing the penalty as well as the statute of limitations in the prosecution of crimes against the elderly.

Claudia Clifford, Montana State Auditors, supported HB 17 stating that the Auditor's office investigates insurance and securities fraud and that in the past five years they have seen a great increase in financial fraud. She stated that the Auditors office put on a conference last year on senior trust fraud. She felt increasing the penalty to a felony for financial crimes against the elderly was appropriate.

{Tape: 3; Side: A; Approx. Time Counter: 137 - 154}

Kathy McGowan, County Attorneys and Sheriff's and Peace Officer's Association, supported HB 15 and HB 17.

Rose Hughes, Executive Director Montana Health Care Association, supported HB 17 to increase the penalty from a misdemeanor to a felony. Regarding HB 15, she suggested making some changes in the language regarding what constitutes abuse.

{Tape: 3; Side: A; Approx. Time Counter: 164 - 232}

John Flink, MHA, supported HB 17.

Opponents' Testimony: None

Informational Testimony:None

Questions from Committee Members and Responses:

REP. NOENNIG asked Leo Gallagher about the language in HB 17 dealing with joint ownership of real property. **Leo Gallagher** stated that it is a difficult prosecution problem; that it is necessary to prove undue influence at the time the property was obtained.

{Tape: 3; Side: A; Approx. Time Counter: 251 - 302}

REP. STOKER asked Mr. Smith about the prosecutions of people outside Montana, to which Mr. Smith could not respond. **REP. STOKER** asked **REP. NEWMAN** whether he could prosecute people who live outside Montana for financial fraud. **REP. NEWMAN** stated that they can prosecute if the victims are within the State of Montana however there are financial difficulties in out-of-state prosecutions.

{Tape: 3; Side: A; Approx. Time Counter: 304 - 340}

REP. CLARK asked **REP. NEWMAN** about the definition "bodily injury" as a substitute for physical or mental. **REP. NEWMAN** stated that the term "bodily injury" is defined in 45-2-101 as physical pain, illness, or impairment of physical condition and mental illness or impairment. **REP. NEWMAN** stated that he does not feel the change in definition changes reporting requirements for people in positions of care of the elderly and developmentally disabled.

REP. RASER asked **REP. NEWMAN** about the definition of mental injury and definition of bodily injury in statutes relating to child abuse. **REP. NEWMAN** stated that the definition would be the same as in this bill. **REP. RASER** asked Leo Gallagher the same question and he stated that he agreed with **REP. NEWMAN'S** response. **REP. HARRIS** asked Mr. Connor if the new definition is broad enough.

{Tape: 3; Side: A; Approx. Time Counter: 431 - 515}

REP. GUTSCHE asked **REP. NEWMAN** about testimony heard by proponents that HB 17 doesn't go far enough and doesn't up the penalties for sexual and physical assault. **REP. NEWMAN** stated that making a good law better is always a goal, and it could be appropriate to address the language. He stated that the bill's intent is to make it easier for prosecutors, judges and juries to protect the elderly and disabled.

{Tape: 3; Side: B; Approx. Time Counter: 40 - 68}

Closing by Sponsor:

REP. NEWMAN closed on HBs 15 and 17.

{Tape: 3; Side: B; Approx. Time Counter: 69 - 74}

CHAIRMAN SHOCKLEY asked the Committee if anyone wished to amend the language in HB 15 regarding the definition of bodily injury.

REP. HARRIS recommended making sure "bodily injury" encompasses the definition of mental impairment. **CHAIRMAN SHOCKLEY** stated the bill's intent is to make this bill mesh with case law regarding "bodily injury." He explained that this will assist in the prosecution of individuals who abuse the elderly and disabled. **REP. NEWMAN** stated the intent of HB 15 is to make the definition in the Elderly Abuse Prevention Act the same as in the criminal code. **REP. HARRIS** responded that **REP. NEWMAN** made an excellent point but that he just wants to ensure the standard is not lessened by the elimination of "mental."

{Tape: 3; Side: B; Approx. Time Counter: 75 - 108}

EXECUTIVE ACTION ON HB 81

Motion: **REP. GALLUS** moved that **HB 81 DO PASS.**

Discussion:

CHAIRMAN SHOCKLEY advised that the rules provide that when someone moves to table a bill, it becomes a non-debatable motion and it can't be discussed. He stated that it is the custom of the Judiciary Committee to allow all bills a fair hearing.

REP. FACEY stated he does not support this bill.

REP. NOENNIG stated that he is undecided but needs some enlightenment on the definition of a firearm. **John McMaster** stated he drafted this bill, and the sponsor wished to have the dictionary definition.

{Tape: 3; Side: B; Approx. Time Counter: 150 - 192}

REP. SALES stated that this bill will not make society safer and opposes HB 81.

REP. CLARK stated that Montana already has statutes to enhance penalties for individuals convicted of crimes where a firearm was used in the underlying offense, and he opposes the bill.

REP. LANGE stated that he spoke with three Billings police officers last night, asking whether they believed this bill would help reduce crime. He stated all three officers believe that it would do nothing to help stop crime, and he opposes this bill.

REP. PARKER stated that there are a number of existing protections to deal with theft of firearms. He stated that if a gun theft were prosecuted as a misdemeanor it would be seized and

placed under evidence, and if a convicted felon is under a suspended sentence and commits a gun crime, he would be revoked. He stated that he is concerned about the creation of different categories for theft.

{Tape: 3; Side: B; Approx. Time Counter: 252 - 273}

Motion/Vote: REP. FACEY moved to TABLE HB 81. Motion carried 14 to 3 with REPS. HARRIS, GALLUS, AND THOMAS voting no.

ADJOURNMENT

Adjournment: 12 P.M.

REP. JIM SHOCKLEY, Chairman

LISA SWANSON, Secretary

JS/LS

EXHIBIT (juh04aad)